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NATIONAL INCORPORATION.

The prominence that has been given to the inter-state commerce clause of the Constitution of the United States, by the Inter-state Commerce Act and the Sherman Act and the proceedings that have been had under them, has tended to obscure, in some degree, other sources of power in Congress to legislate with regard to the great modern aggregations of capital. In particular, the question of the power of Congress to require, for such combinations, or for certain classes of them, incorporation under a national charter, is very commonly discussed, in debate, and by the press, as if the question were simply one of the meaning and scope of the inter-state commerce clause. This tendency so to limit the field of the discussion, appears not only among those who deny, but also among those who assert, the existence of such power in Congress.

To many of those who assert the power of Congress in this respect, the matter seems to be completely covered by familiar precedent, and to be so fully and clearly within the inter-state commerce clause, that they see no occasion for resort to other features of the Constitution, for support, or even for illustration. The matter, as they view it, stands as follows: 1. The right of men to incorporate themselves, for the pursuit of gain, is not a natural right, but is a mere artificial privilege; and where, and to the extent to which, it anywhere exists, it is a mere voluntary grant of affirmative law. 2. Congress has power to regulate inter-state and inter-nation commerce. 3. This power in Congress is exclusive; and being exclusive, it can-

not be crippled, or hampered, or limited, by a State; and a State cannot increase its own legislative power in this respect by putting its legislation into the form of the chartering of corporations: a proposition,—to some minds axiomatic,—affirmed in the Northern Securities case. 4. Therefore, in regulating inter-state and inter-nation commerce and the like, Congress may say whether any, and if any, what, corporations, may act in that field; and may, therefore, exclude State-chartered corporations from it. 5. Finally, whenever Congress has power to deal with any field of individual action,—such, for example, as railroading and banking,—its general power over or in such field of action may be exercised in the form of creating corporations: a general proposition in daily and familiar embodiment before our eyes in the Pacific Railroads and in the national banks, a proposition even stronger on its feet,—if there can be said to be degrees in its strength,—as applied to a field where, as in inter-state and inter-nation commerce, Congress may exclude non-Federal corporations, than as applied to a field such as banking, for example, from which it cannot exclude State-chartered corporations.

But while, to some minds, the matter has this aspect of simplicity and certainty, it is nevertheless true that, on the other hand, there is a wide-spread challenge of the existence of any such power in Congress; a wide-spread, daily assertion that for most classes of business (even such business as includes the inter-state and inter-nation element) the chartering of corporations is a natural, inherent right of the States, and is exclusive with them.

By reason of this present state of the discussion, one who ventures to present considerations tending to the support of the power of Congress, is in a strait betwixt two. To one portion of his readers he will appear to be floundering in a struggle to support axiom by argument; while to others, if we may judge by many public utterances, he will appear a dreamer. "Unto the Jews a stumbling-block, and unto the Greeks foolishness." This very difficulty, however, emphasizes the need of a discussion of the matter, in various forms, and from different points of view, up to the time when the opposing sides shall be able to plead to an issue.

In such a situation,—whatever be the field of thought or the particular subject of controversy,—it often appears that what is most needed, in the way of discussion, is, not so much argument, strictly speaking, as a point of view (and, in addition to a point of view, familiarity, and domestication in the mind,) of propositions not disputed, but not familiar. This is particularly true in respect of questions arising under the Constitution of the United States. The intricate, complicated, and yet harmonious system that has been elaborated out of the broad and simple lines of the Constitution, contains within itself,—as does every great system of thought,—the power of affording light upon any one question, by a great number of analogies. The proper range of discussion, therefore, for the present question, is a wide one. One may draw from it freely, for arguments proper, or for illustration and enforcement; for point of view; for perspective; for life, and familiarity, and warmth.

It seems proper, in view of the present wide divergence of views, and of the formless character of much of the discussion in the press, to attempt, not so much to fortify the brief inter-state commerce clause argument summarized above, by new arguments, as to call up before our minds, and to group together, certain matters, familiar in themselves, with the aim of obtaining a proper perspective. And since, in this country, as the result of our system, great questions of public law are, and of necessity must be, debated not only by and before the fraternity of lawyers, but also by and before the general public, and must be passed upon, in the first instance, by a legislative body largely composed of laymen, and are settled, for the most part,—whatever be the theory,—by general public opinion, and since, therefore, the mind of the general public must always be kept in view, even by lawyers, the writer will feel free to treat the matter in a more popular way than would be fitting for a subject exclusively of strict legal cognizance.

1. *The United States in its character of local sovereign.*

It is constantly asserted, and taken for granted, that the several States are the sole natural depositories of the power to create and to regulate trade corporations; and that Congress,—granting that it can legally enter the field,—would come in as an intruder, and by an improper, indecorous,

and uncalled-for enforcement of a mere technical right: as the fraudulent beneficiary of a slip of the pen on the part of the framers of the Constitution. Indeed, of late years, it has come to be part of the unvoiced, but effective, atmosphere of our minds, that one State, favored by internal temperament and by a fostering environment, may properly assume in the field of corporation-making, not merely a natural superiority to the nation, but even a sort of hegemony as between itself and its sister States. Nothing is so hard to disturb by argument, as mental atmosphere. Nevertheless, we will venture to inquire into the grounds of this assumption of inherent superior moral and natural right of the States to precedence over the United States, in this field of law making.

The assumption appears to rest upon the familiar proposition that the States have all powers not taken from them by the Constitution, and that the United States has only such powers as are given to it by the Constitution. This doctrine, however,—whatever may be the exact proper definition of it, and the exact proper scope of its operation,—does not cover the situation. In its proper definition and application, it widely differentiates the States, as a class, from the United States, but from the United States in only one of its two distinct political capacities. For while the national government, within the area covered by the States, is one branch of a dual government—State and national—it is itself dual; and in one of its two characters it has, and exercises, a far greater freedom, and a far wider range of political dominion and sovereignty, than those which a State enjoys within its own territorial limits. In its own principalities,—the most conspicuous of which are the District of Columbia; the Territories, organized and unorganized; the Insular Possessions and the Canal Zone,—it has a power, and a free hand, such as no State approaches. In but a small part, if in any, of this aggregate independent domain is there a right of representation; and in the great bulk of it, measured by area, or importance, or population, there is no representation in fact. No citizen of the District of Columbia, for example, casts a vote upon any subject, or is in any way represented. In no part of the aggregate domain is there a constitutional check upon freedom of legis-

lation, equivalent, either in form or in extent, to the check put by the Constitution of the United States upon the several States. A State is required to have a republican form of government; a principality of the United States is not. And the United States acts, in its own principalities, not merely with this great liberty, approaching absolutism, but, within these domains, and in respect of their affairs, in a separate character and capacity. It acts, here, not as suzerain of the States, but as local sovereign. Its distinct character of local sovereign is illustrated in the doctrine that courts of justice in the Territories, even although created and maintained by the national government under provisions of the Constitution, are not "courts of the United States" within the meaning of that phrase in the Constitution: are not, for example, within the life-tenure provision; are courts simply of the United States in its role of local sovereign.[1] The District of Columbia, and each organized Territory, has, like a State, a full body of legislation, enacted either directly by Congress or under power delegated by Congress; it has its "General Statutes" or "Compiled Statutes," or "Code," as detailed and bulky as those of a State. In any one of these independent principalities,—the District of Columbia, for instance,—the United States, in its character and capacity of local sovereign, has the same power that any other local sovereign has, of creating corporations, both for domestic consumption and for export; and this power, in both its forms, has been freely exercised. Under a too-liberal general incorporation law, but lately modified, travelling corporations, formed by non-residents, have swarmed forth upon the country at large, from that Federal domain. In this respect the United States, in its capacity of local sovereign of the District of Columbia, has competed with the most active States; and its corporations have had, in law, and in practice, the same footing as corporations of the several States. With reference to our general subject, therefore, one should have before him the fact that just as the several States have and exercise the power to charter corporations and to send them on their travels, to the same extent, and in the same degree, the United

[1] Clinton *v.* Engelbrecht (1871) 13 Wall. 434; Am. Ins. Co. *v.* Canter (1828) 1 Pet. 511; Benner *v.* Porter (1850) 9 How. 235.

States exercises this power over its various principalities. The United States, in its character of local sovereign, is in this respect the full equal of the States, not only in theory,—which is not impressive,—but in practice, which should be impressive. The assumption that the States possess, or have enjoyed, a superiority over the United States, in the corporation competition, is absolutely without foundation.

In what has been here said as to local sovereignty, it has not been intended to deduce from that fact, in and of itself, a right of Congress to require Federal incorporation for any class of business, in or among the States. It has been attempted merely to dispel a certain impression of supposed existing inferiority of the United States, in law or in practice, in the realm of corporation-making.

If, in legislating broadly, Congress should desire to invoke, for possible advantage, its power as a local sovereign, —a matter upon which the writer expresses no opinion—it could do so, if at all, in the form of general legislation; for the United States may, in a given piece of legislation, as in any other field or instance of action, blend its two characters or capacities, and fall back, for justification, upon one, or upon the other, or upon both, for support. It could, for example, in a compulsory general incorporation act for interstate and inter-nation commerce, charter all its corporations as corporations of the District of Columbia, if there should be foreseen an occasion to resort, for any particular of authority or of scope, to the character and capacity of local sovereign. It is enough, however, for our present purpose, to point out that the United States, in the corporation rivalry with which the country has for some time past been favored, has taken a hand quite as extensively as the average State; that it is not an outsider, but is already in the game.

2. *Establishment and enforcement of a national public policy.*

The jurisprudence of every country is pervaded by a subtle, all-penetrating element, which we call public policy. Public policy is another name for a code of morality or propriety to which all transactions, to be valid, must conform. This code and its standards, in any given com-

munity, vary, of themselves, from time to time, with changes of public opinion; but it is a common thing for the law-making power, in a given country, to change them. When, in a given country, standards have been advanced a stage, by law, and the code of morality or propriety thus broadened, the new additions to the original code or standards merge into the original stock and have its rights and its privileges of operation. In our States, in the general field of the national government, and in the several exclusive local jurisdictions of the United States, legislative extensions of existing standards of morality or propriety are often justified (in legal phraseology) by the "police power," so called. But this term presents nothing but an aspect of fixed standards of propriety of individual action.

It was long denied that the United States, except, of course, in its character and capacity of local sovereign, and for its own principalities, was a nation or country, in a sense pertinent to the doctrine of public policy or police-power.[1] It was contended, first, that, in its general capacity, the United States had not, and could not establish, a public policy; and, second, that if it had such a code, it was limited to a standard universally recognized in this country at the formation of the government; and that that code Congress had no power to extend. This contention has been laid at rest. Congress, to the extent to which its power of legislation extends to the people at large, can fix for them, a standard adverse to lotteries; a standard of morality and propriety for pictures or printed matter, and standards of business honesty.[2] Congress may even introduce into the general body of inter-state or revenue statute law, an exception, limited to the area of a given State, for the purpose of co-operation with such State in a local feature of its public policy: as, in respect of the sale of spirituous liquors.[3]

Not only may Congress establish a code of morality or propriety but,—such seems to be the inevitable conclusion from the decided cases,—having established it, it may pro-

[1] See Lottery Case (1903) 188 U. S. 321; argument, pp. 325–334; dissenting opinion, p. 364.

[2] Lottery Case (1903) 188 U. S. 321; Public Clearing House *v.* Coyne (1904) 194 U. S. 497.

[3] In re Rohrer (1891) 140 U. S. 545; Vance *v.* Vandercash (1898) 170 U. S. 438.

ceed to enforce it,—however foreign it may be to the code of morality or of propriety of any State, throughout the entire field of national activity,—in the mails, for example; in the revenue service; in the patent and copyright law; in the whole field of inter-state commerce. It was contended that the postal facilities belonged to all; that inter-state express facilities were the right of all; and that Congress could not utilize these facilities to enforce, by a sort of outlawry, its standards of public policy. It seems to be settled, however, that a standard of public policy established by Congress, permeates the whole fabric of national life, and may be applied by Congress to any of either the primary or the secondary functions of the national government.

There is unquestionably a limit to which a State or Congress can go, in establishing such standards of morality, propriety, or practical convenience; but there is no limit which would prevent Congress from adopting, as part of its public policy—and, it would seem, under the decision, from applying to the whole field, and in all the operations of the national government,—almost any standard, requirement, or limitation in respect of complete or partial monopoly. From the very infancy of formulated law among the English speaking peoples, an assumption by any individual, without special dispensation, of more than what was considered, at a given time or place, his reasonable share of business or of work—an assumption, that is to say, of a share so great as to interfere with the free and natural flow of trade, or with the necessary or natural and proper opportunities of others—has, with or without legislation, been deemed dishonest, or immoral, as inconsistent with wholesome conditions in the community. "Forestalling," "re-grating," "engrossing," general or local "monopoly," contracts "in restraint" of "trade" or of "labor," have, at various times and in different forms and in different degrees, been in conflict with the sense of fitness and propriety of the English-speaking peoples. For centuries, the record has been unbroken; differences and distinctions have been only in applications of the general rule. Congress, in the Sherman Act, has adopted the general principle into the body of Federal public policy; and, having adopted it, has,—under the interpretation given to the

Sherman Act by the Supreme Court,—carried the principle to a degree of strictness and rigidity never before known, and has introduced it, as a compulsory standard, into the whole field of inter-state and inter-nation commerce.

As with monopoly, so with combination. From time immemorial, the common law has drawn a distinction, not merely of degree, but of kind, between action of a single individual, and combined action, or even joint planning, of two or more persons. The distinction has pervaded both the criminal and the civil law. In the common law of crimes, one person may, without criminality, do a thousand and one things which it is criminal for two or more in combination to do or even to plan to do. There is practically no limit to the common law of criminal conspiracy. In the civil branch of the law, combined action, while in general permissible, has always been viewed as subject to legislative control merely by reason of its being combined action. The reason given is that union is strength; that two or more individuals, by pooling their forces, put the unassociated individual at a disadvantage, and thereby entitle him to protection. In fine—harsh and unfamiliar as the proposition is, when put nakedly—the mere fact of a joining of forces between two or more individuals, is a matter raising directly the question of public policy, and giving jurisdiction to the courts and to the law makers. In a given form, it frequently is in contravention of existing public policy; but an existing public policy may, without regard to other grounds of justification, be broadened almost at will,—the Northern Securities case seems to say at will,—to cover any form of combination not already within it. In dealing, on the ground of public policy, with the matter of concerted action, Congress is not limited to precedent in respect of the details of application of the principle. We see how far the Supreme Court has carried the power of Congress to extend the common law prohibition of restraint of trade. In recognizing this broad sweep of power in Congress, as declared in and by the interpretation given to the Sherman Act, the Court,—whether right or wrong in its interpretation of the intent of the framers of the Act,—only followed a familiar rule: the rule relating to the development of ex-

isting roots or stocks of law. The courts recognize, as inherent in the law, certain well-defined roots or stocks, as we may call them; and view the law as capable of statutory extension, not merely by the introduction of new principles, but by statutory development and enlargement of an original root or stock, and with this vitally important distinction, that an enlargement of an original root or stock has the incidents of the original. Thus, the law of nuisance may be broadened by statute to include liquor-selling; and thereupon, since equity could, without the intervention of a jury, abate a common-law nuisance, equity may constitutionally be empowered to abate a liquor-saloon without jury trial.[2] So, a State compulsory separate-maintenance statute, of the modern type, is viewed by the courts, not as new law, but as a statutory development of the ancient stock of ecclesiastical divorce and marriage law, and, therefore, as free from the constitutional requirements of jury trial.[3] In accordance with this line of legal thought, extensions of the policy of the law into the field of joint or combined action of two or more persons, upon almost any matter, is open to the States; and, under the Federal doctrines referred to above, is open to Congress, where Congress is concerned at all. Of this power to develop and enlarge, by statute, an existing root or stock of the ancient law, and of the extent of the power, we could have no more striking illustration than is presented by the Sherman Act, as it has been interpreted. The ancient principle of public policy in respect of combinations, was the doctrine of the unlawfulness of combined action or planning to an unreasonable degree; while that Act, as interpreted by the Supreme Court, forbids not merely unreasonable, but all, combinations in restraint of trade, omitting the element of degree, although that had always previously been an element in the application of the principle.

It is, therefore, competent to Congress—we are speaking here, in a purely academic way, of power, not of policy—to exclude from the national field, on the ground of public policy, not only corporations, but partnerships,

[1] Mugler *v.* Kansas (1887) 123 U. S. 623.

[2] Bigelow *v.* Bigelow (1876) 120 Mass. 320.

boards of trustees of Trusts, and, in fact, any group of two or more persons; and there is no sacredness in State-incorporated association, as against Federal power, above other forms of association.[1]

We do not need to undertake to draw from this national power of exclusion, in and of itself, the conclusion of the power of Congress to require a national charter; but the power of exclusion tends to make this conclusion more easy of domestication in the mind.

3. *Incapacity of the States to make compacts or agreements with each other.*

Article I, Section 10 of the Constitution of the United States provides:

> "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State."

It would have been fatal to a harmonious and effective federal system, to have States free to form themselves, in respect of one or more subjects, into groups or sub-federations. It was plainly deemed impossible to draw a line; and the Constitution therefore forbade compacts and agreements of every kind, unless made with the consent of the nation as represented by Congress. We can easily see various evils and difficulties which would flourish to-day, if the States were allowed any sort of freedom in this particular. As the result of this limitation, we have forty-five States, no longer local and individual in any considerable degree in their interests, but involved,—they and their respective citizenships,—one with another, in a thousand complications of interests, calling for an immense variety of forms of concerted action: in questions of sewage and of water-supply in and from rivers that flow through different States; questions of inter-state bridges and inter-state railroads; questions of nuisances near a border-line in one State, but affecting an adjoining State; questions of protection, within the limits of one State, of forests vital to the needs of other States. Such questions,—and most conspicuously of all, perhaps, questions of inter-state transportation,—present themselves at every moment, and demand concerted action of two or more States. Only the most in-

[1] Northern Securities Co. *v.* United States (1904) 193 U. S. 197.

significant steam railroad corporation, to-day, can operate, financially or physically, except by, and through, and in dependence upon, such concert of State action. Concerted action of States in different groups upon the theory of systematic and permanent concert, is at the foundation of our vast railroad system. Yet, in respect of all this, the States, unless by grants of power from Congress, are powerless to make any compact or agreement whatever with each other. A State may to-day be acting in concert with an adjoining State; to-morrow it may change its policy. As far as the States themselves have power, there can exist between States nothing but "gentlemen's agreements." This limitation upon the States to make compacts or agreements with each other,—in respect of corporation life and management among other things,—may not, in and of itself, yield the conclusion of power in Congress to require a federal charter. It would theoretically be possible, by a series of consents by Congress, to put the present vast net-work of State "gentlemen's agreements" on the basis of effective compact. The limitation, however, and the singular extra-legal situation which it now presents, and the need of a resort to Congress for legal sanction, can fairly be said to throw light upon the question of the power of Congress; to afford an important standpoint from which to view the subject. It may at least be cited to dispel the assumption that the chartering of corporations for inter-state commerce is a power of which the States are morally and naturally the sole proper depositories.

It may be said, in reply, that the present system works smoothly; that,—in respect of railroads, for example,—out of the very incapacity of the States to bind themselves to each other by compact, deft nature has, by a beneficent evolution, developed in the States a capacity to act in steady concert without binding compact; and that this pleasing result nullifies all *a priori* argument drawn from the incapacity to contract. "Behold, how good and how pleasant it is for brethren to dwell together in unity!" Undoubtedly, there is a good deal of truth in the statement of actual harmony and concert; but, to complete the picture, it should be added that, in a large degree, nature has evolved the present harmony in railroad legislation, by putting the

control of the State governments, in respect of railroad matters, largely into the hands of the railroads. It is not so much that the States have developed a golden age of harmony among themselves, as that they have been rolled flat by the railroads.

4. *Lack of State power of exclusion.*

By the operation of the Federal Constitution, a State is without power to exclude a corporation of another State, in so far as that corporation is engaged in inter-state commerce and the like.[1] In other words, a given State is, in large measure, subject to the corporate policy,—perhaps utterly hostile to its own,—of any or all of the other States, unless Congress comes to the rescue. The air is full of complaints, on the part of certain States, of such intrusion by other States, and not only of intrusion, but of competing and conflicting intrusion. The power of an invading State in such case rests—it is to be observed—not upon any affirmative Constitutional or other provision, but upon the fact that the regulation of such commerce is exclusively for Congress; and that if Congress does not regulate it, it goes without regulation. The field of inter-state commerce activity is, so far, a vacant region, where each man raises his Ishmael's-hand against his fellow-man, not because he has the right to do so, but because no one who has the power to stay him has interposed. It is not questioned that Congress has the right to put an end to this lawlessness; to substitute law for absence of law; to substitute government for anarchy. But, it is constantly said, Congress can do so only in the form of establishing rules for State-chartered corporations. But these rules, it seems clear, may go to the exclusion of such corporations altogether, on the ground of a federal policy of law to that effect. Or, without going so far, Congress could certainly fix uniform rules of capitalization, stock-issue, and all other internal affairs of State-chartered corporations as conditions precedent; for it has been solemnly adjudged that State corporation-charters do not over-ride the Constitution and laws of the United States, and without the power to prescribe such symmetry and uniformity, there would be no

[1] Pensacola Teleg. Co *v.* West. Un. Teleg. Co. (1877) 96 U. S. 1; Cooper Mfg. Co. *v.* Ferguson (1885) 113 U. S. 727.

effective power to regulate. The several States, therefore, in order to hold the field for their respective corporations, would, at the demand of Congress, at least have to enact corporation laws according to a form prescribed by Congress. And a power to dictate legislation travels close to a power to legislate.

5. *A No-Man's-Land.*

Much of the vagueness and uncertainty that pervades the discussion of this subject, arises out of a failure to recognize the fact that the field, except in so far as the national legislature has dealt with it, is unoccupied. While we all know this to be a fact, we are nevertheless confronted, at every turn with a bland waving-away of its existence. We seem to hear Mrs. General saying: "A truly refined mind will seem to be ignorant of the existence of anything that is not truly proper, placid, and pleasant." One class of disputants place themselves back as of a date prior to the formation of the Constitution, and assume that the question of State and Nation is still open, and that the Constitution is, as a manufacturer would say, "in process." Another class go back not so far,—only forty, or thirty, or ten, or five, years,—but assume as open and unsettled what has within recent periods been settled. Both classes incessantly assume,—without formulation, but with firmness,—that the millions of daily individual acts which constitute the bulk in importance of the industrial and commercial transactions of over seventy million people, are now under potential and actual regulation by the several States; and speak as if certain revolutionists were now proposing to oust the States from a field which they are occupying. No intelligent settlement of this question can ever be had, until there is not merely a formal, lifeless, literal admission, but a general, familiar recognition, of the fact that,—with some slight qualifications not necessary to be dealt with here,—this vast and all-important field is and can be occupied and controlled by no government at all, except in so far as it is or shall be occupied by the national government.

6. *Other sources of power in Congress.*

As has been stated above, Congress, when it adopts a rule of public policy, can apply it in any field of national

action. Such is the only possible conclusion from the Lottery Case. It follows, that Congress, if it should adopt a public policy adverse to the present heterogeneous system of large rival State-chartered corporations warring among themselves, could, without resort to the inter-state commerce clause, exclude State-chartered corporations, or such types of them as it might deem obnoxious to public policy, from the mails, and from periodicals carried in the mails; from the holding of patent rights; from the national banks; from admiralty waters, including the great navigable rivers and the Great Lakes; and from the other agencies and fields of government influence or action. Can there be any doubt, under the Northern Securities case and the Lottery Case, that all the combinations dealt with by the Sherman Act, can constitutionally be so excluded? We need not elaborate this point or dwell upon it; but it may fairly be said to throw light upon the question whether Congress, having, admittedly, the power to regulate inter-state commerce and the like to an almost unlimited extent, has power to prescribe that no corporations, or no corporations of more than a certain magnitude, shall enter the field unless they be of federal creation and thus under exclusive federal control.

Let us turn, now, to certain questions, half legal, half practical, which would present themselves to Congress in enacting a general corporation act.

1. *Shifting over.*

It would not be necessary for existing State-made corporations to be dissolved. Whatever academic difficulties there might be if the question were a new one, have been dispelled. For forty years we have been carrying on practically all the deposit and discount banking business of the country under an Act of Congress pursuant to the provisions of which a State-chartered bank may transform itself, out of hand, into a national bank. Thousands of banks, practically all the important old State-chartered banks, have so transformed themselves, with no disturbance of corporate existence[1] or of rights or

[1] Michigan Ins. Bank *v.* Eldred (1892) 143 U. S. 293; Metrop. Nat. Bank *v.* Claggett (1891) 141 U. S. 520.

liabilities. The change has been unnoticed except in the filing of a few papers and a showing of assets and a fixing of the capitalization.[1] In a national incorporation act, a similar provision could be made in respect of legitimate State-chartered corporations.

2. *Local business.*

It is asserted that a corporation with a federal charter could not engage in local, meaning *intra*-State, activities, so that it would be either crippled, or compelled to have a State-chartered double. To this the answer is two fold. In the first place, such a national corporation,—at least if chartered in and as of the District of Columbia or other portion of the national domain,—would have as much power, in a given State, for local business there, as a State-chartered corporation of one State now has in another State. But we do not need to rest there. The question is settled, both in its legal and in its practical aspect. The great inter-state railroads chartered by Congress,—the Union Pacific, for example,—do the local railroad business of the belts which they serve, precisely as if they were local State-chartered roads. In the banking field, the great bulk of the local deposit and discount banking is done by national banks.

This all rests upon the broad proposition that the principal thing carries with it all necessary incidents,—a proposition which has been worked out in a great variety of forms, in respect of the relations between the States and the nation. The working of it out has resulted in the conclusion that in almost no branch—perhaps in no branch—of government or law can a sharp and exact line be drawn between State and national jurisdiction. The Federal courts have exclusive jurisdiction of suits involving the validity of patents; but a State court may invade this field, by way of necessary incident to the trial of an ordinary suit of State court cognizance.[2] So, on the other hand, the United States in many ways, enters, on the theory of incident, into the State realm. A State probate court has the control of a minor ward and of his estate and of his guardian; but in so far as the estate is traceable to a United States pension, the United States (by way of incident to the

[1] Cases last cited. [2] Pratt *v.* Paris Co. 168 U. S. 255.

pension power, which is an incident of the war power), can intervene and hold the guardian to criminal liability, under a Federal statute, for unlawful maladministration.[1] The State probate courts have the settlement of estates of decedents; but the United States courts, in cases of diverse citizenship, intervene so far as to render a declaratory judgment against the executor or administrator.[2] A Federal court can be empowered by Congress, as an incident of the protection of national citizenship, to take a State criminal case, based upon violation of a State penal statute, away from a State court, and to acquit, or to condemn and sentence; and the Federal court not only thus intervenes and supersedes the State court, but takes over to itself the sovereignty of the State, and sits, not, in strictness, as a Court of the United States, but as a court of the State.[3] A federal judge, without a jury, may, by way of incident to the necessity of protection to the federal judiciary, take from a State court, and try, and to all practical intents acquit, one lawfully indicted by the State court for a crime against a State law.[4] In a recent case it has been held that a purely intra-State combination is a violation of the Sherman Act, if it is a feature and incident of a larger combination which directly violates that Act.[5] In fact, the doctrine of incident has been carried, in a great variety of ways, far beyond such an application of it as would be involved by a provision for the carrying on of local business by corporations chartered by Congress primarily for inter-state and inter-nation commerce and the like.

3. *Manufacture.*

A question presents itself as to the possible status,– under an exclusive national incorporation act for inter-state and inter-nation commerce,– of large manufacturing concerns, primarily manufacturers, but selling their output wholly or largely by way of inter-state or inter-nation commerce. There are several answers to this question. In the first place, the difficulty, if difficulty there is, could, at the

[1] U. S. *v.* Hall (1878) 98 U. S. 243.

[2] Yonley *v.* Lavender (1874) 21 Wall. 276.

[3] Tennessee *v.* Davis (1879) 100 U. S. 257.

[4] *In re* Neagle (1889) 135 U. S. 1.

[5] Montague Co. *v.* Lowry (1904) 193 U. S. 38.

worst, be met by a dual corporate organization, State and national, with the same stockholders and officers. In this day of voluntary intricacy and complexity of corporate relations, such duality, in and of itself, could hardly be seriously complained of.

But a national incorporation law would not require or involve such duality. In a case of manufacture for sale, the manufacture is no more important than the sale. The two operations are equal in magnitude; and the manufacture is as much an incident of the sale, as the sale is of the manufacture. The application of the doctrine of incidents has never gone into mere subtleties; it has sought practical results. No one,—to take from actual business life an example which embodies the general judgment of our people,—ever inquires, from the present point of view, into the relation between a given national bank's local business and its other business.

In fact, this objection, certainly capable, at worst, of being met by the simple device of dual incorporation,—will probably be found, in most cases, to come from those who, under the present system, involve themselves voluntarily in endless corporate entanglements.

4. *Holding corporations.*

Corporations of this class,—including all of what have been aptly termed the "labyrinthine corporations," whether organized as pure holding-corporations or not,—are, in their very essentials, in conflict with the policy of the general law of corporations; and a national incorporation law would inevitably forbid such a confusion of ideas as they involve. The fundamental, and only sound, principle of corporation law is that the majority shall rule. The fundamental principle of a holding-corporation is, that by the simple device of having a majority of the stock of one corporation held by another corporation, a majority in the latter—and, thereby, possibly a minority of interest in the original corporation,—may rule the original corporation. Tangles of corporations would, almost certainly, not be admitted to federal incorporation as tangles. A tangle would be obliged to simplify itself, either by abandonment of the holding scheme and a resolving of the tangle into its original elements, or by unifying the mass under one gen-

eral charter, with proper consideration and protection of all minority rights.

5. Leased corporations.

The numberless instances, principally among railroads, of property of one corporation leased by authority of State law, and operated by another corporation, a national corporation Act would not be called upon to disturb, in requiring a shifting of the corporations to national charter. Property rights and the countless contract relations existing between the State banks of the '60's and other persons, were not disturbed by the nationalization of those banks. There might be a requirement of unification; but existing rights could be preserved.

6. Title by Eminent Domain.

A question naturally arises as to title held,—by railroads, for example,—under exercise by a State of the right of eminent domain in favor of a corporation of its own creation. How would a shift-over of such a corporation, under a national law, to a national charter, affect the title so held?

In the first place, as has been suggested above, the case of the many State banks, which, pursuant to the national Banking Act, changed over to a national charter, illustrates the proposition that corporate life created by the State does not in such case disappear, but continues, with full preservation of identity under the national charter and with no loss of property rights.[1] We may, however, go farther. Congress, under its power to establish post roads and military roads, has power to take land, or the necessary easements in land, therefor, by eminent domain, within the geographical limits of the several States. Its power to select a location for such a national road cannot be ousted or qualified in advance by a State taking:[2] the location of the national road may be made precisely coincident with that of an existing State-chartered railroad; and, upon taking over the existing railroad into a national charter, the power of eminent domain could be given. Upon a national taking, there would be nothing due to the original owner of the land or to him who owns the soil subject to the easement of way. He loses nothing. The payment of damages, if

[1] Mich. Ins. Bank *v.* Eldred (1881) 143 U. S. 293.

[2] United States *v.* Gettysburg El. Ry. Co. (1896) 160 U. S. 668.

any, would be to the State railroad corporation by its other self, the new national corporation,—a fiction of payment, one hand paying the other. The highly academic character of this consideration illustrates the practical view, namely, that the identity of the corporation for property purposes would not disappear, and that the easement of way is a property right.

7. The Question of Federal license.

The Sherman Act has been in force fifteen years; it undertakes to exclude all monopoly and restraint from inter-state and inter-nation commerce and the like; but monopoly and restraint have grown and thriven as never before. Inter-state commerce is saturated with them. They roll on unceasingly, day and night, on every inter-state railroad. Let us point to another form of statute which has a vast actual operation and effect,—the statutes excluding lotteries and fraud-schemes from the mails. The lottery and fraud-scheme legislation stands on the footing of a theatre-manager who calls for your ticket at the door; the Sherman Act is on the footing of a theatre-manager letting everybody in on credit. Experience, during several hundred years, has proved that, in a multitude of matters, we must, for effectiveness, require an entrance ticket. We license inn-keepers, doctors, dentists, coal-miners, locomotive engineers, and persons of a multitude of other employments. The great fire, life, marine, and other insurance companies do *intra*-state business in the several States, under license. One of the cases that we have cited, to another point,[1] emphasizes, in its doctrine, and in the opinion of the court, the distinction between these two forms of legislation—the punitive and the preventive,—and the ineffectiveness, in many cases, of the former. The distinction is between keeping Pandora's box shut, on the one hand, and on the other hand, letting the cloud of spirits out. There are vast classes of acts which can be prevented only by standing at the threshold. The Sherman Act ignores the distinction and the experience on which it is founded. It is a sop, not a remedy. As experience has demonstrated, it might properly be entitled: "An Act How Not To Do It." It has served, through a number of presidential and

[1] *In re* Neagle.

congressional campaigns, the purpose of pacifying and pleasing the multitude. The public like to see the sword of Damocles hanging. Now and then the Act operates to annoy some group; but it is, broadly speaking, non-operative. It leaves monopoly and restraint where the lotteries and the fraud-schemes would be if they were admitted freely to the mails and to interstate transportation, subject to occasional criminal prosecution upon individual complaint. A Federal license system applied to corporations would be capable of operation.

When a new topic, or a new phase of an old topic, appears upon the field, there may be inherent difficulty in it, or there may not. What appears to be simple may, under discussion, prove to be complicated; what appears to be complicated may prove to be simple. Interests are involved. Prejudices are encountered. The sun is in our eyes. We cannot discern and apply familiar principles. The mere financial magnitude of a problem seems to exempt it from the ordinary laws of thought: we stand confused before vast sums and extensive mileage. There must be,—we feel impelled to say,—a separate world of thought and of reasoning for this matter. New topics are, however, in the end, usually settled upon familiar and simple principles. All at once, the air clears. What we have been discussing as abstruse, suddenly appears simple: everybody understands it. It is as with the wild beast, in Esop, which the countryman, terror-stricken, saw looming in the distance: which, as it drew near, proved to be a familiar domestic animal. In the meantime, any discussion of the topic, however simple its character, however little its intrinsic merit or importance, may, merely as discussion, as an airing of the subject, be not wholly destitute of value.

H. W. CHAPLIN.